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No. 89-453

In the

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC., Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, Et Al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

Charles J. Cooper*
Michael A. Carvin
Susan E. Morley
McGuire, Woods, Battle & Boothe
The Army and Navy Club Building
1627 Eye St., N.W.
Suite 1000
Washington, D.C. 20006
202/857-1700

Michael E. Kennedy
Associated General Contractors of America, Inc.
1957 E Street, N.W.
Washington, D.C. 20006
202/393-2040

*Counsel of Record

Balmar Legal Publishing Division, Washington, D.C., 20005, (202) 682-9800

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BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

The Associated General Contractors of America, Inc., with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the petitioner. The letters of consent have been filed separately herewith.

INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918. AGC regularly represents the interests of the construction industry throughout the United States. AGC counts approximately 8,000 of the nation's leading general construction contractors among its approximately 32,500 members. These contractors are engaged in all forms of commercial construction and are responsible for most of the nation's highways, bridges, commercial buildings, industrial facilities, and municipal utilities. AGC has 102 local chapters, repre-

senting each of the 50 states. AGC members perform a very substantial amount of construction for many federal agencies.

AGC represents its members in judicial proceedings, in the United States Congress, and before federal Executive agencies. AGC members have a great interest in public contracting policies and procedures because they are directly engaged in the construction and reconstruction of most of the nation's infrastructure. As an *amicus curiae*, AGC filed a brief in the Fourth Circuit in *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1986), and in this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). AGC chapters have been parties in several related cases, including *Michigan Road Builders Ass'n. Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd.*, 109 S. Ct. 1333 (1989) and *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).

AGC's long-standing policy is to provide strong support for open, competitive bidding for public construction contracts. The purpose of competitive bidding, and AGC's related policy, "is to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940). Notwithstanding the merits of competitive bidding, the federal government has begun to move away from that impartial system. Federal agencies have woven a large and increasing number of racial criteria into public construction contracts. AGC is concerned that a decision to sustain the Federal Communication Commission's policy would encourage federal agencies and Congress itself to perpetuate these racial classifications. This case directly touches the national concerns of an industry burdened by a resurgence of racial classifications over the last decade.

SUMMARY OF ARGUMENT

The Court reaffirmed last Term that the right to be free from invidious discrimination is not a privilege bestowed by the government on certain select groups, but is an inalienable right shared by each citizen in a Nation dedicated to the primacy of the individual and

equality under law. This bedrock guaranty of nondiscrimination, so noble in principle, finds itself sacrificed in practice. The constitutional prohibition against governmental prejudgment on those paradigms of the invidious – race and ethnicity – has given way not to any claim that temporary adjustment is necessary to ensure equal treatment of others, but to crude stereotype and naked social engineering.

Specifically, the Federal Communications Commission ("Commission"), which has concededly never discriminated against Hispanics or the other groups receiving this rigid racial preference, has now determined that discrimination designed to increase the "representation" of certain groups in the broadcasting industry serves society's interest in making the airwaves more "diverse." We contend that use of racial distinctions for this purpose cannot be countenanced, but must be reserved for those rare situations where it is essential to extinguish an egregious and intransigent pattern of discriminatory conduct. In all events, the principle of nondiscrimination surely cannot be sacrificed in circumstances where, as here, there is a nonracial alternative that will directly advance the government's purported interest. This analysis obtains notwithstanding that the racial discrimination here is being practiced by the federal government, particularly since that discrimination is not remedial, is not attributable to Congress, and is not imposed pursuant to Section 5 of the Fourteenth Amendment.

ARGUMENT

Last Term's seminal decision in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), gave voice, firm and clear, to certain basic precepts about the nature and meaning of equality under the law – our Constitution's solemn promise to every individual.[1] When measured against any one of these fundamental precepts, the Commission's racially preferential licensing policy must fall.

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[1] These principles had been reflected in earlier decisions of the Court, but had never before commanded a majority opinion.

First, and most fundamentally, the fact that an official racial classification, such as the Commission's licensing policy in this case, disadvantages nonminorities rather than a "discrete and insular minorit[y]"[2] is without constitutional significance. *Croson* "reaffirm[ed] the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."[3] *Croson*, 109 S.Ct. at 721. Accordingly, "racial classifications of any sort must be subjected to 'strict scrutiny'." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring). *See Croson*, 109 S.Ct. at 721; *Ward v. Rock Against Racism*, ___ U.S. ____, 109 S. Ct. 2746, 2758 n. 6 (1989); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724 n. 9 (1982). Thus, "to pass constitutional muster, [racial classifications] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [their] legitimate purpose." *Palmore v. Sidoti*, 466 U.S. 429, 432-433 (1984), quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

Croson also reaffirmed the principle that a racial preference is subject to an extraordinarily demanding standard of justification regardless of the relative "ability of different groups to defend their interests in the representative process." *Croson*, 109 S. Ct. at 722. This principle follows from the fact that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id.* at 721, quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).[4] That being so, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person

[2] *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

[3] *See also Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-80 (1986); *id.* at 285, 286 (O'Connor, J., concurring); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

[4] *See also Bakke*, 438 U.S. at 299 ("[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group.").

of another color." *Croson*, 109 S. Ct. at 721, quoting *University of California Regents v. Bakke*, 438 U.S. 265, 289-90 (1978).[5]

Moreover, race and ethnicity are "factor[s] having no relation to individual worth." *Croson*, 109 S. Ct. at 721, quoting *Bakke*, 438 U.S. at 298.[6] Accordingly, a government policy that takes account of an immutable trait that says nothing about the needs, abilities, interests, or aspirations of individual citizens, is quite naturally viewed with suspicion. *McCleskey v. Kemp*, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) (state actions suspect when based on the "categorical assessment of the worth of human beings . . . insensitive to whatever qualities the individuals in question may possess").

In short, *Croson* plainly establishes that the Constitution's equal protection guaranty protects not classes, but people, prohibiting the official burdening of any individual on the basis of racial classifications that "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[5] Since the "core purpose of the Fourteenth Amendment was to do away with all governmental imposed discrimination based on race," the equal protection of laws must mean that any official racial discrimination — regardless of the victim's race — is almost always invalid. *Palmore*, 466 U.S. at 432. *See also McCleskey v. Kemp*, 481 U.S. 279, 340-41 (1987), (Brennan, J., dissenting) ("Race is a consideration whose influence is expressly constitutionally proscribed. We have expressed a moral commitment, as embodied in our fundamental law, that this specific characteristic should not be the basis for allotting burdens and benefits."); *Korematsu v. United States*, 323 U.S. 214, 235-40 (1944), (Murphy, J., dissenting) ("To give constitutional sanction to [racial discrimination is] to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."), cited in *Croson*, 109 S. Ct. at 724.

[6] *See also id.* at 727, quoting *Fullilove*, 448 U.S. at 533-35 ("Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."); *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (illegitimacy "bears no relation to the individual's ability to participate in and contribute to society"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society."); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (race and national origin are "seldom relevant to the achievement of any legitimate state interest"); *id.* at 451 (Stevens, J., concurring).

Since all individuals have the same constitutional right to be free from official racial and ethnic discrimination, and since race and ethnicity say nothing about an individual's worth, the question arises whether a government can ever have a legitimate, let alone compelling, interest in distinguishing among its citizens on the basis of such inherently irrelevant traits. The answer, according to *Croson*, is that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson*, 109 S. Ct. at 729. In other words, government may take account of the extent to which one's race would operate as an impediment to his full enjoyment of the relevant government program or benefit, absent some race-conscious countermeasure. In such narrow circumstances, the government is not suggesting that it attaches any importance to skin color, but rather that it has been compelled to make reference to color because the failure to do so would leave in place intransigent exclusionary barriers rooted in past intentional discrimination.

For this reason, the Court has never upheld race-conscious action unless it was necessary to eliminate the lingering exclusionary barriers created by an entrenched pattern of egregious official discrimination. *See Local 28, Sheetmetal Workers International Ass'n. v. EEOC*, 478 U.S. 421, 445, 474 (1986) (racial preference "necessary in order to effectively enforce Title VII [by] . . . dismantl[ing] prior patterns of employment discrimination and . . . prevent[ing] discrimination in the future" by a defendant who "has engaged in persistent or egregious discrimination"); *United States v. Paradise*, 480 U.S. 149, 171-172 (1987) ("long term, open and pervasive discrimination"); *Fullilove*, 448 U.S. at 478 (minority business program directed at "the existence and maintenance of barriers to competitive access which have their roots in racial and ethnic discrimination"); *id.* at 483.

In these circumstances, the government is not distinguishing between minorities and nonminorities on the basis of race as such, but on the basis of their dissimilar likelihood of being excluded, absent racial countermeasures, by the discriminatory barriers that remain in place. *Croson*, 109 S. Ct. at 722. Conversely, this Court has emphatically rejected every other purported justification for race-conscious measures. The Court has consistently ruled that government may not favor an individual in order to increase the representation of his racial

group so that it more nearly mirrors the group's representation in the community. Any such attempt to "correct" "underrepresentation" is nothing more than "discrimination for its own sake." *Bakke*, 438 U.S. at 307.[7]

For essentially the same reason, the Court has rejected as illegitimate the goal of remedying "societal discrimination." *Croson*, 109 S. Ct. at 723.[8] Since the "societal discrimination" rationale is indifferent to whether there was or is any discrimination in the particular program, it authorizes the government to introduce race into a program as an eligibility criteria for the first time even where there have been no race-based barriers to minority advancement, or at least none that cannot be overcome without disadvantaging nonminorities on a racial basis. Accordingly, the Court has rejected societal discrimination as "too amorphous a basis for awarding a racially classified remedy," for it would permit a court to "uphold remedies that are ageless in their reach into the past and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. *See Croson*, 109 S.Ct. at 723.

The Court has similarly rejected any standard that equates a statistical imbalance in the relevant program with lingering discrimination. It is "completely unrealistic," the Court has noted, to assume that, absent discrimination, racial or ethnic proportionality would result in a field of endeavor; thus an imbalance provides no warrant for employing racial preferences. *Croson*, 109 S. Ct. at 728.

In keeping with the severity of the strict scrutiny standard for testing racial preferences, the Court has imposed an equally severe

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[7] *See also Croson*, 109 S. Ct. at 728 ("[It] cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."); *Local 28*, 478 U.S. at 485 (Powell, J., concurring) ("A court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination."); *id.* at 487 (O'Connor, J., concurring) ("The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance."); *Bazemore v. Friday*, 478 U.S. 385 (1986).

[8] *See Wygant*, 476 U.S. at 274, 276 ("prior discrimination by the governmental unit involved" is required); *Local Number 93, International Ass'n. of Firefighters v. City of Cleveland*, 478 U.S. 501, 532 (1986) (White, J., dissenting) ("An employer may adopt . . . racially discriminatory hiring or promotion practices . . . only as a remedy for its own prior discriminatory practices.").

evidentiary burden on those who claim that their activities are or have been infested with a "pattern of deliberate exclusion" that needs to be broken down through new discrimination. First, "particularized findings" of past invidious discrimination in the program must be made. *Id.* at 723, quoting *Wygant*, 476 U.S. at 276. Such findings must be supported by a "strong basis in evidence." *Id.* at 724, quoting *Wygant*, 476 U.S. at 277.[9]

An equally important safeguard against the premature use of race-conscious measures — that is, their use other than as a necessary last resort — is the requirement of narrow tailoring. The key requirement in this regard is that defendant show that "less intrusive alternatives," such as victim-specific relief, are unavailable or unavailing.[10]

The Commission's racially preferential licensing policy plainly fails every element of the "strict scrutiny" test. The Commission's blanket racial preferences are neither designed nor necessary to remedy any discrimination anywhere identified, and the purported nonremedial justification is not only facially invalid and devoid of any limiting principle, but amounts to little more than a crude racial stereotype. Further, for the reasons we discuss presently, it is quite clear that this analysis obtains here notwithstanding the fact that the federal, rather than a state, government is engaging in this invidious discrimination.

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[9] The minimum showing from which an inference of discriminatory exclusion could arise is one that establishes a significant statistical disparity between the number of qualified minorities willing and able to participate in the activity and the number of minorities actually participating. *Croson*, 109 S. Ct. at 729.

[10] It is well established that since the use of race must be "necessary" to accomplish a compelling purpose, existence of a less discriminatory method renders the racial classification invalid. See, *e.g.*, *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 279 n. 6 ("[T]he classification at issue must 'fit' with greater precision than any alternative means."); *Ward v. Rock Against Racism*, ___ U.S. ___ 109 S. Ct. 2746, 2758, n. 6 (1989) (*Croson* "is a strict scrutiny case" and "least intrusive means" analysis therefore applies); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

A. Strict Scrutiny Applies To The Commission's Racially Preferential Policy

The threshold issue here is whether the strict scrutiny standard affirmed in *Croson* applies, and applies in the same way, to the racial classification contained in this *federal* program. Some members of the Court have indicated that the "unique remedial powers of Congress under Section 5 of the Fourteenth Amendment" allow the federal legislature somewhat broader latitude in invoking race-conscious remedies than is available to states. *Croson*, 109 S. Ct. at 718-719.[11] Whether and to what extent this is true need not be resolved here, because the Commission's racial preference scheme is not remedial, is not attributable to Congress, and is certainly not enacted under Section 5 of the Fourteenth Amendment.

1. As an initial matter, we note that Congress did not enact the policy at issue here. It was, rather, established by the Commission, or more accurately, by the Court of Appeals for the District of Columbia Circuit, which required the Commission to impose these racial preferences against its wishes. *See TV 9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973); *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Congress' exclusive role in the matter has been to stop the Commission, through an appropriations rider, from determining whether any empirical or other support existed for either its remedial or diversity rationale — support that the Commission conceded was theretofore entirely lacking. *See Winter Park Communications v. FCC*, 873 F.2d 347, 363 (D.C. Cir. 1989) (dissenting opinion).

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[11] Justice O'Connor and Justice White indicated in *Croson* that, under *Fullilove*, some amount of additional deference is owed to Congress' remedial efforts under Section 5. *Id.* at 718-721. Justice Kennedy did not join this portion of the opinion and suggested that this rule is a "difficult proposition." *Id.* at 734. Justice Scalia believes that uniform standards should apply to all racial preferences. *Id.* at 735. The Chief Justice's views are not entirely clear; although he joined the relevant portion of Justice O'Connor's opinion in *Croson*, he also joined Justice Stewart's dissent in *Fullilove*, which expressly rejected the notion that race-conscious action is somehow entitled to less searching scrutiny because it is enacted by Congress. *Fullilove*, 448 U.S. at 523. Finally, the dissenters in *Croson* also appeared to reject the notion that different standards apply to the actions of federal and state governments in this area. *Croson*, 109 S. Ct. at 755.

Passing the point that this congressional interference with the Commission's "execution of the laws" is itself of doubtful constitutional validity,[12] the sum total of Congress' involvement in the issue was to force a "mental standstill" at the Commission while the agency was in the midst of belatedly seeking to discern for itself whether its racial discrimination had any rational foundation. *Id.* at 364. While the funding rider obviously had the effect of freezing the Commission's policy in place, and was apparently intended as a *post hoc* endorsement of the *status quo ante* by those few legislators who may have known of its existence, the fact remains that the policy thereby frozen was the Commission's, not Congress'.

Thus, no deference is owing to a congressional judgment here, especially since Congress' only judgment was to "endorse" a racial diversity policy by preventing the relevant agency from examining whether there was any factual basis for the policy. *Winter Park*, 873 F.2d at 351.[13] A federal administrative agency must have a particularly strong and explicit mandate from Congress if it seeks to cloak itself with the federal legislative power when defending a policy that raises serious equal protection concerns. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114, n. 46 (1976) (In light of discriminatory immigration policy, the Court "require[d] a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule.").

On its own account, the Commission is obviously entitled to no deference beyond that afforded state or local governments, since it clearly possesses no civil rights expertise. *See Fullilove*, 448 U.S. at 468; *id.* at 515-516 and n.14 (Powell, J., concurring); *Bakke*, 438 U.S. at 309-310; *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("competent" authority required). In fact, the federal department having such expertise, the Department of Justice, has concluded in this very case that the Commission's policy is unconstitutional. *See Winter Park*, 873 F.2d at 352.

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[12] *Bowsher v. Synar*, 478 U.S. 714, 736 (1986). *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

[13] Of course, it was only after Congress had announced that there was a nexus between race and diversity that the Congressional Research Service completed the FCC study on whether some such support could be found.

2. Moreover, even assuming that the Commission's policy is attributable to Congress, it clearly is not attributable to any congressional action taken pursuant to Section 5 of the Fourteenth Amendment. As a result, there is no basis for subjecting the Commission's racially preferential policy to review less strict than that applied to the city in *Croson*.

Section 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719, quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (hereinafter "*Morgan*"). Since the Fourteenth Amendment, by its terms, applies only to the states, it obviously cannot provide Congress with any remedial power, unique or otherwise, concerning the actions of the *federal* government.

Section 5 gives Congress special competence and authority over the affairs of state governments in matters potentially affecting equal protection guaranties. Under Section 5, Congress has the ability to enforce the scope of the Fourteenth Amendment's nondiscrimination principle, a role that is in other contexts performed exclusively by the judiciary. *See Morgan*, 384 U.S. at 651; *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (enforcement power under Section 2 of the Fifteenth Amendment). And Congress' "power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S. Ct. at 719 (emphasis in original). As a result of Congress' unique role of insuring the states' compliance with the Fourteenth Amendment, the courts give special deference to congressional efforts to enforce this nondiscrimination guaranty.

In the context of race-conscious classifications, the lead opinion of *Fullilove* concluded that congressional imposition of racial "goals" on states in connection with their federally funded contracting program was due special deference as an exercise of Congress' Section 5 authority. *Fullilove*, 448 U.S. at 483-484. Since Congress had mandated these race-conscious measures, and since they were directed at historically entrenched discriminatory barriers existing in the state

programs, the plurality was more inclined to presume that the policy, taken as a whole, was generally remedial in purpose. Thus, because Congress has a "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," the Court accords special deference to Congress' views concerning the measures necessary or appropriate to prevent or remedy potential violations of the Amendment. *Croson*, 109 S. Ct. at 719.

But Congress has no such special competence, and thus deserves no special deference (save that normally accorded a coordinate branch of government) where, as here, it is not redressing any perceived discrimination by the states, but is simply using a suspect criterion in a purely federal program enacted pursuant to the commerce or spending powers. When there is no issue concerning the states' compliance with the Fourteenth Amendment, Congress cannot invoke its role under Section 5 as an enforcer to justify its racially preferential policies; it is only a discriminator. In this context, the Constitution's equal protection guaranties operate solely as "an explicit *constraint*" on federal power, not as a source of power. *Croson*, 109 S. Ct. at 719. Since Congress in these circumstances wears only one hat with respect to the Constitution's nondiscrimination principle, it is judged on the same terms as a state government: it has no greater authority to rely on "odious" criteria as a means of conferring public benefits or burdens.[14]

Any doubts in this regard are dispelled by the treatment given by this Court to Congress' use of suspect or quasi-suspect classifications in federal programs. The Court has repeatedly rejected Congress' use of gender-based classifications in a variety of contexts without giving any special deference to Congress' remedial or fact-finding powers. Many of these statutes were intended by Congress to provide a "benign" or "remedial" advantage to women. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v.*

[14] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas, these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); *Hogan*, 458 U.S. at 732-33 ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.").

Richardson, 411 U.S. 677 (1973); *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Nonetheless, in each such case the Court independently examined and rejected the factual assumptions underlying these classifications. While Congress' gender-based distinctions may have been empirically justified as a general matter, they were nonetheless impermissibly overbroad in that they used gender as a "proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). *See also Wiesenfeld*, 420 U.S. at 645; *Goldfarb*, 430 U.S. at 205-206; *Frontiero*, 411 U.S. at 690. Indeed, two such cases, *Wiesenfeld* and *Frontiero*, were cited in *Croson* as examples of cases in which the Court will not defer to congressional recitation of a benign or legitimate purpose. *Croson*, 109 S. Ct. at 724, 729.

It is true that the Court did accede in one case to this sort of generalized congressional "fact finding" in a nonremedial setting, but *Croson*'s citation of that regrettable decision's *dissent* reflects that in recent times "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *See Korematsu v. United States*, 323 U.S. 214, 235-240 (1944) (Murphy, J., dissenting); *Croson*, 109 S. Ct. at 725.

Further, quite apart from the extent and sources of Congress' remedial power in the area of civil rights, Congress surely has no such power to authorize a racial preference where the preference serves no remedial purpose. Since, for the reasons discussed more fully below, the congressional policy here was not claimed to be and could not reasonably be viewed as "remedial," and since there is nothing unique about Congress' ability to discern the relationship, if any, between minority ownership and content of programming, strict scrutiny applies with full force to the Commission's discriminatory licensing policy. *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 923 (D.C. Cir. 1989) (opinion of Silberman, J.).[15]

[15] Even if the standards articulated by the *Fullilove* plurality fully applied here, the equal protection analysis would not markedly change and certainly not in any way that would affect the disposition of the case. A comparison of that case and *Croson* reveals that Congress differs from other government actors only to the extent that it is relieved of the responsibility to make "specific findings of discrimination to engage in race-conscious relief." *Croson*, 109 S. Ct. at 719. (Three Justices comprising the *Fullilove* majority would have applied a more lenient standard, but this analysis was

Finally, if the Court nonetheless reaches the question of Congress' remedial authority, it should reaffirm that "Congress' power under § 5 . . . 'is limited to adopting measures to enforce the guarantees of the [A]mendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'" *Hogan*, 458 U.S. at 732, quoting *Morgan*, 384 U.S. at 651 n. 10. Since the equal protection guaranties of the Fifth and Fourteenth Amendments are "precisely the same" (*Wiesenfeld*, 420 U.S. at 638 n.2), there is no basis in law or logic for holding that an "equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress." *Croson*, 109 S. Ct. at 734 (Kennedy, J., concurring).[16]

B. The Commission's Racial Preferences Are Not Justified By A Compelling Governmental Interest

There are two purposes potentially underlying the Commission's racial preferences — to provide a remedy for past discrimination and to promote "diversity." Neither suffices, however, because the Commission has admitted that its racial preferences do not serve any remedial goal, and this Court has made clear that such discriminatory devices cannot be justified by any nonremedial goal. We will examine each point in turn.

1. The Commission's disavowal of any intended remedial purpose should foreclose inquiry into this basis for sustaining its racial discrimination.[17] In any event, the only statement or evidence conceivably related to discrimination of any kind is the assertion contained in the Congressional Report accompanying establishment of a racially preferential lottery for broadcast licenses. That report states that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the mass media communication, as it has adversely affected their participation in other sectors of the economy as well." H.R. Conf. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982). *See also Shurberg*, 876 F.2d at 914-918.

As the Report's references to "underrepresentation" and "other sectors of the economy" demonstrates, Congress' comments concerned at most societal discrimination. Moreover, the cited underrepresentation is devoid of probative value because the statistical benchmark is apparently gross population figures, rather than the "number of qualified minority [firms] willing and able to perform." *Croson*, 109 S.Ct. at 729. Nor is there any evidence suggesting past discrimination by the "particular governmental unit involved." *Wygant*, 426 U.S. at 724. *See also Firefighters v. City of Cleveland*, 478 U.S. at 532 (White, J., dissenting) ("An employer may . . . engage in racially discriminatory hiring or promotion practices . . . only as a remedy for its own prior discriminatory practices."). *Croson* reaffirmed that such a specific showing of discrimination is constitutionally required.[18]

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premised on the view that equal protection safeguards differ for minorities and nonminorities, which is contrary to the holding in *Croson*.) Congress must, however, have a "strong basis in evidence" before it embarks on any such remedial effort. *Croson*, 109 S.Ct. at 724; *Fullilove*, 448 U.S. at 477-78 ("abundant evidence"). Moreover, both *Fullilove* and *Croson* recognize that Congress' identification of a national problem does not provide a basis for *implementing* a remedial program at the local level in a race-conscious manner absent an additional showing that each local application is genuinely remedial — that is, limited to those who have actually been harmed by prior local discrimination. Since national programs of the sort established in *Fullilove* must "explicitly recogniz[e] that the scope of the problem would vary from market area to market area," each locale must "identify the discrimination it seeks to remedy in its own jurisdiction." *Croson*, 109 S. Ct. at 726-27. In this regard, the *Fullilove* plurality also stressed that any preference should be given only to those firms "whose competitive position is impaired by the effects of disadvantage and discrimination." *Id.* at 471; *see also id.* at 464. As *Croson* noted, "the Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have 'pass[ed] muster.'" *Croson*, 109 S. Ct. at 718, quoting *Fullilove*, 448 U.S. at 487. Since Congress did not possess any evidence remotely identifying any discrimination by the Commission or even in the broadcast industry generally, it plainly had no remedial justification under *Fullilove*.

[16] This Court has repeatedly held that Congress' ability to enforce equal protection guaranties does not authorize it to rachet down those same guaranties. *E.g.*, *Morgan*, 384 U.S. at 651 n.10.

[17] The Commission has repeatedly disavowed that there is any remedial purpose underlying its policies. *Winter Park*, 873 F.2d at 363 (dissenting opinion). When the Court is applying strict scrutiny or reviewing the action of an administrative agency, it will not supply an interest not asserted or relied upon by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Hogan*, 458 U.S. at 730; *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987). Nor, for the reasons discussed above, did Congress supply the necessary remedial predicate here.

[18] The burden is on the defendant to show that its program is narrowly tailored to serve a compelling government interest. *See, e.g., Bakke*, 438 U.S. at 311 ("Petitioner

To be sure, *Croson* stated that government need not blind itself to the fact that private discrimination in some circumstances may create "discriminatory exclusion" from government programs as effectively as if government employees themselves were engaging in such invidious practices. *Id.* at 726. In *Croson*, for example, if "the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could have taken action to end the discriminatory exclusion." *Id.* at 726. Thus, if the state or local government becomes a "passive participant" in a system rife with discrimination, it need not sit back and watch discriminatory actions infect its program. *Id.* at 720.

Of course, *Croson*'s recognition that a state should not "exacerbate," "induce," "encourage," "assist," or otherwise become a "joint" or "passive participant" in private discrimination hardly suggests that the existence of unrelated private prejudice not tied to the government program would afford a remedial predicate for racial preferences.[19] Indeed, any more expansive understanding of *Croson*'s teaching in this regard would nullify the majority opinion's repeated, unequivocal admonition that one organ of government cannot "extrapolate" a remedial predicate from discrimination unrelated to the program involved. *Id.* at 727.

First, as previously indicated, the *Croson* Court made clear that a congressional finding of societal discrimination, under either the *Fullilove* or *Croson* standard, does not suffice to authorize racially preferential action in a particular program. For example, Congress' finding that there "had been nationwide discrimination in the construction industry" was of "extremely limited" probative value because

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did not carry its burden of demonstrating that it must prefer members of particular ethnic groups in order to promote better health-care delivery to deprived citizens."); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *Minneapolis Star and Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575, 592-93 (1983); *Hogan*, 458 U.S. at 730 n. 16 (1982).

[19] Of course, an appropriate governmental body may prevent and punish invidious private discrimination without any showing whatever; the requirement of precisely identifying existing discriminatory exclusion is needed only if the governmental actor seeks to require or engage in racial discrimination.

"Congress has made national findings that there has been societal discrimination in a host of fields." *Id.* at 726-727. The Court also held that seeking to remedy discrimination in an entire industry swept with too broad a brush. As the Court put it: "Like the role model theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 723.

Nor may geographically removed "findings of discrimination . . . be 'shared' from jurisdiction to jurisdiction." *Id.* at 727 ("We have never approved the extrapolation of discrimination of one jurisdiction from the experience of another."). Similarly, the necessary finding of "systematic exclusion" from the relevant program is not satisfied by a finding of discrimination that is geographically related (i.e., "school desegregation in Richmond") but "does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." *Croson*, 109 S. Ct. at 727. Since such unfocused or irrelevant findings of discrimination shed no light on what, if any, exclusionary devices would be confronted today by a minority participant in the program, they "could justify a preference of any size or duration." *Id.* at 727.

It is thus "essential" for a government body, such as the Commission in this case, to supplement any general congressional findings with specific findings of "discrimination in their own bailiwicks." *Id.* at 727. In this case, as in *Croson*, there is no evidence that "qualified minority [applicants] were passed over for [broadcast licenses]." *Id.* at 730. Given the highly structured adjudicatory procedures that are used in comparative hearings, as well as the elaborate review process, it would be most surprising if any such discrimination could seep into the process undetected by either the Commission or the District of Columbia Circuit Court of Appeals. Moreover, the private broadcast industry is not able to influence the access of minority broadcasters to federal licenses in a manner analogous to the control exercised by prime contractors in Richmond of minority subcontracting firms. Nor do broadcasters receive "public dollars" from the Commission. *Id.* at 720. There is thus no possibility that the Commission will play a role as a joint participant, analogous to that of the city in *Croson*, with any private discriminator bent on excluding minorities. In all events,

neither Congress nor the Commission has referred to any evidence of racial discrimination in the broadcast industry.

The only barrier identified thus far is that minorities as a rule have less capital than nonminorities. *See Shurberg*, 876 F.2d at 914 and n.15. Lack of money can hardly be viewed as a barrier, discriminatory or otherwise, erected by a government program. *Cf. Harris v. McRae*, 448 U.S. at 297, 316-317 (1980).[20] It is simply one of many "nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise." *Id.* at 722-723. *Croson* held that such factors may be addressed only through "race-neutral devices to increase the accessibility of . . . opportunities to small entrepreneurs of all races." *Id.* at 729.[21]

Introducing race into the Commission's selection process would not affect, let alone remedy, whatever problems minorities tend to have in getting financing. Indeed, any such preference goes, by definition, not to the disadvantaged, but to those who already have sufficient funds to start a television station and to secure necessary financing. Thus, those minorities "who benefit from the disparate treatment are those who were . . . not 'needy [ ]' and who are 'least likely to have been victims of . . . discrimination.'" *Orr v. Orr*, 440 U.S. 268, 282 (1979) (citations omitted). Such a "[race]-based classification which, as compared to a [race]-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Id.* at 282-283.[22]

[20] The Commission does not charge fees or otherwise extract consideration for the valuable broadcast licenses; it simply ensures that applicants have the minimum financing necessary to operate the station if they receive a license.

[21] Moreover, even if the Commission were shown to have taken actions with a discriminatory effect, remedial action would not be justified, for it is only "*deliberate* exclusion" of minorities that supplies a potential remedial predicate. *Croson*, 109 S. Ct. at 729 (emphasis added). *Accord*, *Wygant*, 476 U.S. at 284 n.13 ("prior, purposeful discrimination"); *Local 28*, 478 U.S. at 445 ("egregious discrimination"). Moreover, "findings of a constitutional or statutory violation must be made" before embarking on any race-conscious scheme. *Croson*, 109 S. Ct at 729. Since the Commission is not subject to any statutory effects tests in its licensing practices, but only the Constitution's intent standard, it cannot supply the requisite legal violation absent finding purposeful discrimination. *Washington v. Davis*, 426 U.S. 229 (1976). *See Bazemore, supra.* In any event, only a most bizarre theory of remedies would authorize intentional racial discrimination of the sort that would otherwise violate the Constitution to "remedy" constitutionally permissible neutral practices that have a disproportionate burden.

The absence of any remedial justification for the Commission's discriminatory licensing policy renders it unconstitutional. In *Croson* five Members of the Court squarely held that "classifications based on race" are "strictly reserved for remedial settings." *Id.* at 721.[23] The Court should reaffirm that holding.

Any nonremedial justification, by definition, injects considerations of race not because it has been made relevant by the prior invidious discrimination of others, but because government itself has made it relevant to achieve its own purposes. "[S]uch a result would be contrary to both the letter and spirit of the constitutional provision whose central command is equality." *Croson*, 109 S. Ct. at 727. *See also DeFunis v. Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting) ("The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."). But even were it possible to hypothesize a nonremedial justification without these fatal deficiencies, it certainly would not be the one offered by the Commission here, for inherent in the diversity rationale is the racial stereotyping that normally typify such nonremedial theories.

[22] Also as in *Croson*, there "is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the [Commission's operations]." *Id.* at 727-728 (emphasis in original). Also as in *Croson*, "[t]he gross over-inclusiveness of [this] racial preference strongly impugns [any] claim of remedial motivation." *Id.* at 728.

[23] The *Croson* majority thus acknowledged the "requirement that [a defendant] identify the discrimination it seeks to *remedy*" as the *sine qua non* of any official race-conscious measure. *Id.* at 727 (emphasis added). The Court also stated that the City of Richmond had violated the Constitution "*because* [it] failed to identify a need for remedial action." *Id.* at 730. Similarly, the *Croson* Court noted that the "role model" theory was rejected in *Wygant* precisely because it "had no relation to some basis for believing a constitutional or statutory violation had occurred." *Id.* at 723. *See id.* at 730-731 n. 1 (Stevens, J., concurring) ("But unlike the Court, I would not totally discount the legitimacy of [nonremedial] race-based decisions that may produce tangible and fully justified future benefits."). Likewise, the *Wygant* plurality acknowledged the "requirement that race-based state action be remedial." *Wygant*, 476 U.S. at 278. *See ibid.* ("The trial court *must* make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.") (emphasis added).

2. Since neither Metro nor Rainbow owns other broadcast properties, selection of either to receive the contested license would result in "diversity" as that term is traditionally understood at the Commission: a new and, in that sense, distinct voice on the broadcast spectrum. *See FCC v. NCCB*, 436 U.S. 775 (1978). Yet only Rainbow received the preference. It was preferred not because of any distinctive programming it offered, a factor to which the Commission is indifferent, but because its principals are "Spanish-surnamed."

There are two potential reasons why the Commission viewed the Rainbow owners' ancestry as relevant to "diversity," as it now defines that term. First, the Commission might have thought it desirable to have more Hispanics owning radio and television stations, at least until the percentage of Hispanic owners roughly approximated their representation in the general population. Second, it might have believed that Hispanics as a group disproportionately possess a trait that is important to meritorious broadcast service — namely, a greater propensity to engage in "minority programming." Either of these justifications would be at war with the Court's precedent and any meaningful principle of equal treatment.

If the former interest is being served by the Commission, such "discrimination for its own sake" is, as we have previously noted, facially unconstitutional. *Bakke*, 438 U.S. at 307. The latter interest is equally illegitimate, for it uses the irrelevant characteristic of race as a proxy for the potentially relevant nonracial characteristic of minority programming. The Commission's use of racial discrimination in lieu of a nonracial criterion better tailored to achieve the purported goal is reason enough to condemn the Commission's scheme. The Commission's use of race is particularly offensive, however, because it is premised on the stereotypical notion that an individual has a greater affinity for his "own kind" and because it expressly disavows any interest in the potentially relevant nonracial characteristic.

In light of the Commission's schizophrenic policies toward minority ownership over the years, it is not clear whether the challenged policy uses "minority programming" as a pretext for racial discrimination in favor of minority owners, or whether it uses racial discrimination in favor of minority owners as a grossly overbroad

proxy for minority programming. Whatever the case, it is plain that the Commission is solely concerned with developing more minority owners, not with any increase in minority programming.

First, the Commission itself has repeatedly characterized its goal as correcting the underrepresentation of minority owners in the broadcast industry. It has suggested that, if this policy has any end date, it will be when the percentage of minority-owned stations is in balance with nationwide minority representation. *See Shurberg*, 876 F.2d at 906, 914-15; *Winter Park*, 873 F.2d at 360. The policy's duration will bear no relationship to the state of minority programming.

Moreover, the Commission has deliberately and faithfully ignored all of the criteria it would have examined had it been concerned with serving the needs of minority audiences. It has never defined minority programming and has never inquired into whether licensed applicants would provide "minority programming" (however defined). Nor does it inquire into whether any minorities reside in the relevant service area; or whether there are any minorities in the service area whose programming interests have not already been satisfied; or whether there are any minority station owners already in the area; or (by virtue of the congressional rider) whether there is any link between a licensee's race and the programming produced. *See TV9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973) (court concluded it could be assumed that minority ownership would foster program diversity); *Winter Park*, 873 F.2d at 356 (dissenting opinion); *Notice of Inquiry: In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 52 Fed. Reg. 596 (Jan. 7, 1987).

Indeed, the Commission acknowledges that it could not care less whether its racial preferences in any way enhance its ability to select a licensee who will better serve a minority audience: "[W]e reject any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed service area . . . . [T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station [was] specifically program[med] to meet minority needs." *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264-1265

(1982), *aff'd., West Michigan Broadcasting Corp. v. Federal Communications Commission*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

To be sure, the Commission's emphatic statement merely confirms that which is otherwise obvious; the Commission is not at all concerned with whether Hispanics receiving a preference will address the needs of an Hispanic audience (if one exists) or anything else about what the owner may say or show. The Commission is interested only in whether a Hispanic is saying it. Thus, the "diversity rationale" reduces to this: the Commission discriminates against some racial groups because it believes it is sociably desirable to advance the interests of other racial groups. The invidious nature of this discrimination would be palpable were the Commission awarding government contracts to build roads or missiles. Relying, however, on Justice Powell's observations in *Bakke* concerning the benefits of an integrated educational environment, the Commission maintains that its discriminatory policy should nonetheless be upheld because licensing decisions have communicative aspects, which are, in turn, affected by race and ethnicity. *See Bakke*, 438 U.S. at 311-315.

Unlike the situation addressed by Justice Powell in *Bakke* — college students living together in an integrated environment where they can develop mutual tolerance and respect for those of other races — there is little if any interaction between the owner of a broadcast station and the station's audience. Since few people know, and fewer still care, who the owner is, the owner's race simply cannot promote whatever values of tolerance or respect that may be derived from programs featuring minority group members or otherwise providing a "minority perspective" on things. Since a nonminority owner would be no less capable of providing this type of "minority programming" than a minority owner, the skin color of the owner cannot be determinative of the programming received by the community. Hence, race cannot rationally serve as a basis for preferring, say, a Hispanic over a nonminority owner who proposes to provide Spanish-language programming.

The Commission's response is that, while a nonminority owner may be *capable* of providing minority programming, he might be less *likely* to do so. The opinions below of Judge Silberman and Judge

Williams persuasively demonstrate that this proposition is extraordinarily doubtful as an empirical matter. *See Shurberg*, 876 F.2d at 921-24; *Winter Park*, 873 F.2d at 357-61.[24]

There is a more fundamental objection to the Commission's discriminatory policy, however. The Court of Appeals for the District of Columbia Circuit has put it well: "[I]t is contrary to one of our most cherished constitutional and societal principles. That principle holds that an individual's taste, beliefs and abilities should be assessed on their own merits rather than categorizing that individual as a member of a racial group presumed to think and behave in a particular way." *Steele v. FCC*, 770 F.2d 1192, 1198 (D.C. Cir. 1985), *vacated* (October 31, 1985).

Since the guaranties of the Constitution and the civil rights laws create "personal" rights, "guaranteed to the individual," the bedrock principle of nondiscrimination is that the government must treat its citizens "as *individuals*, not as simply components of a racial, religious, sexual or national class." *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083 (1983) (emphasis in original), quoting *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978). *See also Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972) ("[T]he basic concept of our system is that the burden should bear some relationship to individual responsibility.") Accordingly, even an empirically verifiable generalization about members of a particular racial group provides no warrant for using group membership as a "proxy for other, more germane bases of classification." *Hogan*, 458 U.S. at 726, quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Manhart*, 435 U.S. at 708 ("even a true generalization about a class can not justify class-based treatment".).

For this reason, the Court has repeatedly struck down sex-based classifications that benefitted women, even though the classifications

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[24] The Commission's argument is premised on the notion that, for nonminority and minority owners alike, "dubious, ethnically-determined taste will outweigh the economic imperative of what the audience wants to hear" — a proposition that is both highly implausible and contrary to the fundamental assumptions that have driven the Commission's market-based deregulation policy over the last decade. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) *vacated* (October 31, 1985). *See Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989); *Office of Com. of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Shurberg*, 876 F.2d at 923.

were based on accurate generalizations about men and women. "[T]he State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as by one that gender classifies." *Orr v. Orr*, 440 U.S. 268, 283 (1979).[25] Since gender-based classifications are judged only pursuant to mid-level scrutiny, and there are, albeit few, genuine differences between the sexes, these holdings apply *a fortiori* to racial and ethnic classifications.[26] Thus, in *Bakke*, the claim that minority doctors were more likely to serve disadvantaged communities was rejected as a justification for preferential medical school admissions:

> An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage.

Bakke, 438 U.S. at 311, quoting *Bakke v. Regents of University of California*, 553 P.2d 1152, 1167 (1976). *See also Palmore*, 466 U.S. at 433.

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[25] *See, e.g., Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980) ("[i]t may be that there is empirical support for the proposition that men are more likely to be the principal supporters but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience"); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (law that required only husbands to pay alimony struck down because "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still 'would not adequately justify the salient features of' Alabama's statutory scheme"); *Wiesenfeld*, 420 U.S. at 645 (social security provision benefitting widows struck down; "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support . . . [b]ut such a gender-based generalization cannot suffice"); *Goldfarb*, 430 U.S. at 205-206 (same); *Frontiero*, 411 U.S. at 689-90 (law favoring serviceman struck down). *Cf. City of Los Angeles Depart. of Water and Power v. Manhart*, 435 U.S. 702, 704-12 (1978) (sex based actuarial tables violate Title VII); *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-84 (1983) (same).

[26] *See, e.g., Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 279 ("The classification at issue must 'fit' with greater precision than any alternative means."); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Indeed, the Court has reserved its harshest condemnation for racial prejudgments of the sort relied on here — those holding that group membership is relevant because it reflects something about the way individuals in the group think and behave. The Commission's policy is unquestionably premised on such a racial stereotype. For its racial preferences to make any sense at all, the Commission must believe that members of a racial group tend to think and behave alike. Otherwise a Hispanic would have no greater insight into the needs of a Hispanic audience and would not better "represent" their thinking than would a non-Hispanic. Public policy should not be based on the expectation or assumption that minorities will speak only as "representatives" of their group, rather than as individuals with unique needs, interests, talents, and aspirations.

Any doubt in this regard is decisively removed by the Court's decision in *Wygant*. There the government defendants tried to justify their racially preferential scheme by advancing the so-called "role model" theory, under which minority teachers received a layoff preference because they provide a "role model" for minority (and other) students. The "role model" theory is indistinguishable from the Commission's diversity rationale. And Justice Powell's plurality opinion in *Wygant* squarely rejected the role model theory, concluding that any judicial tolerance of the theory "could lead to the very system the Court rejected in *Brown v. Board of Education*." *Wygant*, 476 U.S. at 276.

Since the Commission's diversity theory is even more squarely based on the notion that people think and speak and behave as members of a race rather than as individuals, its acceptance by this Court would pose the same danger. And it will provide others with equally compelling rationales for excluding minorities from juries (at least where they are overrepresented),[27] from working at country and western radio stations (*cf. Beaumont Branch of the NAACP v. FCC*,

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[27] The Court, of course, has ruled that the distinct qualities of different groups may justify *prohibiting* discriminatory exclusion of jurors, but has expressly rejected the notion that any such differences might authorize engaging in such discrimination. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Cf. Duren v. Missouri*, 439 U.S. 357, 371, n. * (1979) (Rehnquist, J., dissenting).

854 F.2d 501, 510 (D.C. Cir. 1988)), and from a host of other endeavors.[28]

In the face of all this, the Commission suggests that it must use race as a surrogate for minority programming because, while the Fifth Amendment does not require it to be color-blind, the First Amendment does indicate that it should be content-blind. *See, e.g., Shurberg*, 876 F.2d at 946 (Wald, J., dissenting). But if it is true that the First Amendment frowns on governmental allocation of the broadcast spectrum on the basis of program content, then the Commission has no legitimate interest in seeking to increase minority programming. Content-based discrimination accomplished through subterfuge offends the First Amendment no less than straightforward content-based discrimination. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936). If, on the other hand, the Commission has authority (as it seems to under current law) to take account of the existence of minority and other programming, it plainly has no "compelling" interest in choosing race instead. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

In sum, all the Commission can point to in support of its racial preferences is one congressional report making conclusionary assertions about "underrepresentation" in the broadcast industry and "other sectors of the economy." As this Court has noted, however if all the

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[28] *See Castaneda v. Partida*, 430 U.S. 482, 504 (1977) (Marshall J.) (rejecting argument that Mexican Americans would not discriminate against fellow group members; "this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups"); *Fullilove*, 448 U.S. at 553 (Stevens, J., dissenting) ("[t]oday there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole."); *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28 (1984) ("In claiming that women might have a different attitude . . . , the Jaycees rely solely on unsupported generalizations about the relative interests and perspectives of men and women . . . . [W]e have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions."); *Smith v. Board of Education*, 365 F.2d 770, 782 (1966) (per Blackmun, J.) ("In this day, race *per se* is an impermissible criterion for judging either an applicant's qualifications or the district's needs. This applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with [people] when these descriptions amount only to euphemistic references to actual or assumed racial distinctions.").

Commission "need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection clause will in effect have been rendered a nullity." *Croson*, 109 S. Ct. at 727.

C. The Commission's Policy Is Not Narrowly Tailored.

Since the Commission is pursuing illegitimate goals, we will only briefly point out the overbroad and haphazard nature of the means by which they seek to accomplish them.[29]

First, race-neutral alternatives, such as examining minority *programming*, are not only available but would undoubtedly *better* serve the Commission's desire to diversify programming and enhance minority participation. *See Croson*, 109 S. Ct. at 728-730. Second, the Commission's failure to engage in an individualized, case-by-case determination concerning an applicant's programming plans or status as a victim of invidious discrimination is particularly egregious because the Commission already holds an extensive comparative hearing in which many aspects of the applicant's background and aspirations are explored. "In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy." *Orr v. Orr*, 440 U.S. at 268. *See also Croson*, 109 S. Ct. at 729 ("The interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.").

Nor is there merit in the suggestion by the court below that the Commission's discriminatory policy is somehow sufficiently "flexible" because other factors are considered along with race. *Winter Park*, 873 F.2d at 354. It is quite possible for a racial "plus" to subordinate merit just as effectively as a quota. Such is the case here. The racial and ethnic preference applies in *every* case and will apparently do so either in perpetuity or at least until national proportional representation is achieved for all racial groups. *Id.* at 363. Thus,

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[29] As the Court noted in *Croson*, "it is almost impossible to assess whether the [racial preference] is narrowly tailored to remedy prior discrimination [if] it is not linked to identified discrimination in any way." *Croson*, 109 S. Ct. at 728. Accepting more diffuse, open-ended purposes as sufficiently "compelling" interests would thus drain the requirement of narrow tailoring of any significance.

the Commission's scheme is in essence a 100% quota with possible exceptions made when no minority is interested or possesses the basic qualifications. Moreover, race is balanced against very few other factors, all of which are apparently less important, except for local residency. *Winter Park*, 873 F.2d at 350.

Perhaps more important, the opening up of a new television station in one's community is an extraordinarily rare event; the loss of a license contest therefore works a severe hardship. Moreover, if the opportunity arises in a different location, the nonminority applicant will lose his local preference points, thus virtually guaranteeing that he will lose out to any minority applicant. *See Shurberg*, 876 F.2d at 917. Thus, the loss of this once-in-a-lifetime opportunity is at least as serious as being denied an entry level job in "a particularly specialized area of employment [which can] have the same pernicious effect as the layoff goal in *Wygant*." *Local 28*, 478 U.S. at 488 (Powell, J., concurring).[30]

[30] Thus, the suggestion by the dissenting opinion in *Shurberg* that no "settled expectations" are unduly disrupted by a license denial is particularly puzzling. *Id.* at 951. Petitioner's expectations here were disrupted far more seriously than those of the contractors in Richmond, who could work in the private sector or other towns, and more than Alan Bakke, who could attend medical school somewhere else. In any event, the entire concept of settled expectations is fundamentally misguided because it confuses the requirements of the Due Process Clause with those of the Equal Protection Clause. The latter provision forbids racial discrimination in *all* government programs, regardless of whether the discriminatee had an expectation or "entitlement" to the benefit denied. While no one has an absolute entitlement to a job or benefit, all have an expectation of, and entitlement to, equal treatment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Charles J. Cooper*
Michael A. Carvin
Susan E. Morley
McGuire, Woods, Battle & Boothe
The Army and Navy Club Building
1627 Eye St., N.W.
Suite 1000
Washington, D.C. 20006
202/857-1700

Michael E. Kennedy
Associated General Contractors of America, Inc.
1957 E Street, N.W.
Washington, D.C. 20006
202/393-2040

*Counsel of Record